Supreme Court, U.S.
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No. 94-536

In The

Supreme Court of the United States

October Term, 1994

LOUISIANA-PACIFIC CORPORATION, a Delaware Corporation,

Petitioner,

vs.

MARGARET ORJIAS, ARTHUR O. ORJIAS, JOHN M. ORJIAS, ARTHUR G. ORJIAS, SANDRA L. ORJIAS, STEPHEN H. PRIDY, JANMARIE R. PRIDY, MICHAEL S. PRIDY, KATHERINE M. PRIDY, JAMIE L. PRIDY, ETHEL I. HINES and WENDELL P. HINES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT COMPLY WITH THE REQUIREMENTS OF SUPREME COURT RULE 14.1.

The Petition submitted to the Court does not meet the requirements of Rule 14 regarding the contents of a petition for a writ of certiorari. There is no appended copy of the various "opinions, orders, findings of fact and conclusions of law" entered in this matter by the trial court for the District of Colorado as required by Rule 14.1(k)(ii).

These omitted materials are significant to the Court's determination of the Petition. The matter was the subject of years of complex discovery and pretrial practice, followed by a twelve-day jury trial in 1992. The record before the Tenth Circuit Court of Appeals consisted of nearly 3,000 pages of motions, rulings, documents and transcripts.

The issues raised by Petitioner in support of Certiorari review involve evidentiary rulings by the trial court. The evidentiary matters raised in the Petition were the subject of detailed review and rulings on Petitioner's motions for summary judgment, pre-trial *in limine* motions, motions for Rule 50 determinations, as well as post-trial motions for new trial, judgment notwithstanding the verdict, and remittitur. These rulings were supported by the trial court's knowledge of the circumstances of this case and the factual context developed through discovery and trial.

The failure to include these trial court opinions, orders, findings, and conclusions violates Rule 14.1(k)(ii), and deprives this Court of access to the factual analysis and record which supported the Tenth Circuit's affirmation of the trial court's

exercise of its discretion in these various evidentiary matters. The Petition should be denied for lack of compliance with Rule 14.1.

II.

THE QUESTIONS PRESENTED IN THE PETITION ESTABLISH NO BASIS TO INVOKE THIS COURT'S JURISDICTION FOR CERTIORARI REVIEW PURSUANT TO RULE 10.1.

Petitioner presents four issues upon which it seeks to have this Court exercise its discretion to grant review on writ of certiorari. Petitioner's issues do not meet the threshold requirements of Rule 10.1(a) or (c). The Petition should be denied.

The first issue raised by Petitioner is whether the Tenth Circuit erred in upholding the trial court's decision not to assign collateral estoppel effect to an alleged factual finding and/or evidentiary ruling made in a prior regulatory enforcement proceeding by the U.S.E.P.A., *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141 (D. Colo. 1988), (hereinafter "the Arraj decision"). Petitioner argues that the opinion of the Tenth Circuit violates Rule 10.1(c) because its ruling is contrary to this Court's prior holdings that ". . . if a fact question or right has been distinctly adjudged in a previous action then the doctrine of collateral estoppel applies to a subsequent action involving the same facts. . . ." Petition at 10. However, the case before this Court is a civil tort case between private parties. The EPA enforcement action did not involve either these Respondents, or any of the causes of action litigated in this case.

The Tenth Circuit carefully compared this case to the Arraj decision, and determined that the facts adjudicated in the two cases were not identical:

> The Arraj decision dealt with the narrow issue of whether [Petitioner's] plant had the potential to emit 250 tons per year of carbon monoxide and therefore was required to have PSD permit. . . . The Arraj decision neither addressed the other chemicals being emitted from the Konus heater nor emissions from other stacks. Further, the Arraj decision did not address Colorado regulations, opacity, smoke, odor, lights, or noise. . . . In [the instant] case, Miller testified about the overall emissions from the stacks, and we cannot find any reference in the record of his testimony about carbon monoxide emissions from the Konus heater. Reynolds testified about the wafer dryer, not Konus heater, stack test. Therefore the issues introduced by the plaintiffs were not identical to the issue decided in the Arraj decision.

A45 - 46.

Because the factual issues were not identical and collateral estoppel did not apply for that reason alone, the Tenth Circuit expressly found that it was unnecessary to address the other elements of the doctrine of collateral estoppel. A45.

The cases cited by Petitioner in support of its Petition for certiorari do not conflict with the ruling of the Tenth Circuit. In *United States v. Moser,* 266 U.S. 236, 241, 242 (1924), the Court refused to allow the United States to relitigate an issue between identical parties that had been judicially determined unfavorably to the government in the first instance. In *Montana v. United States,* 440 U.S. 147, 156-9 (1979), the Court ruled that the United States was collaterally estopped from using a surrogate party which it

controlled and which was, in essence, standing in the shoes of the government to relitigate an issue the United States had previously resolved. Similarly, in *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 323 (1979), the Court held that a party having had a full and fair opportunity to litigate an issue of whether its proxy statement was materially false and misleading could not relitigate that same issue in another forum.

Each of these cases cited by Petitioner stand for the proposition that collateral estoppel is only applied when a previously-litigated issue is identical with one presented in the subsequent action. The Tenth Circuit made a detailed and specific finding that there was no factual premise for application of the doctrine. Therefore, no conflict exists between the holding of the Tenth Circuit in the instant case and this Court's prior rulings. As such there is no basis for jurisdiction under Rule 10.1(c).

The second issue upon which Petitioner rests its application for review is the assertion that the trial court erred in refusing to grant a mistrial after a witness allegedly "falsely" testified about the inability of the State of Colorado to monetarily sanction Petitioner, resulting in a lack of fines having been paid by Petitioner. Petition at 11. Petitioner has misstated the record on this matter and its argument is without merit for that reason alone. Assuming, *arguendo*, that Petitioner correctly stated the record, there is no conflict between the opinion of the Tenth Circuit and that of the Sixth Circuit in another case, as alleged by Petitioner.

No less than three times in its Petition, Louisiana-Pacific asserts that Scott Miller, an engineer with the Colorado Department of Health, "falsely" testified at trial that the State of Colorado had not collected fines against Petitioner as of August of 1989. Petition at 6 and 11. However, other than Petitioner, no litigant or jurist involved in any aspect of this dispute has accused Mr. Miller of perjury, and there has never been any adjudication of

that allegation. In fact, there was nothing false about Mr. Miller's testimony, and Petitioner offers no evidence or finding in the record to support the accusation.

Rather, Mr. Miller's testimony came as part of an explanation offered by Respondents to rebut Petitioner's assertion, made in opening statement, that its conduct in operating the plant ". . . had been proper because the State of Colorado had the power to revoke [Petitioner's] permit and shut down the plant's operations, but never did so." A36. As the Tenth Circuit noted: "It was within this context that Plaintiffs called Miller to testify about the regulatory relationship between L-P and the State of Colorado." *Id.* Mr. Miller's remark was an explanation ". . . that a final permit had been issued, in spite of L-P's previous violations, in part to allow the State to collect fines without repeatedly trying to revoke temporary permits. . . . In light of the entire context of Miller's testimony, it is clear that he was describing the Colorado regulatory framework." *Id.*

Petitioner fails to note that the trial court properly instructed the jury regarding Mr. Miller's comment. Petitioner misstates the record by asserting that the trial court only (and "erroneously") instructed the jury that the issue of prior fines was a "disputed issue of fact." Petition at 6. The substance of the trial court's curative instruction was other than as represented by Petitioner. Further the instruction was given not because of any question about the veracity of the testimony but because it raised a collateral issue about payment, or lack thereof, of regulatory fines. In pertinent part, the trial court told the jury:

> That remark tended to introduce a collateral issue into this case, the question of whether or not Louisiana-Pacific has been fined and, if so, how much it has been fined. This is not a case brought by the State of Colorado where we're

> litigating the fine nor is the fact that it has been fined or not fined an issue which is relevant to this case. We're here solely to determine whether this corporation is liable to these plaintiffs in damages. If we got off on debating the issue of a fine, it's a disputed question of fact and Louisiana-Pacific has its own position, it has its own version of events, and it would be entitled to bring that up. The plaintiffs would be entitled to get into it and you and I would be sitting here for hours or days listening to irrelevant material about whether or not Louisiana-Pacific has been fined by the State of Colorado.

A35.

Petitioner alleges a conflict between the Tenth Circuit's opinion on this issue and the Sixth Circuit case of *Francis v. Clark Equipment Company*, 993 F.2d 545 (6th Cir. 1993). A comparison of the Tenth Circuit's ruling and the opinion in *Francis* reveals no such conflict.

In *Francis*, the plaintiff provided extensive expert testimony on strict liability under the risk-benefit standard. *Id.* at 549. Plaintiff then successfully foreclosed cross-examination on these issues by withdrawing that theory of relief. *Id.* The Sixth Circuit found that the trial court's preventing the cross-examination was error. *Id.* at 550-51.

The Tenth Circuit, in discussing *Francis*, noted the differences presented by the record in this case. In contrast to *Francis*, the cited remark by Mr. Miller was one isolated statement in the course of hours of testimony from this witness. The Tenth Circuit looked at the facts surrounding the statement, the curative

instruction provided, and the context of the trial in deciding that the trial court properly exercised its discretion in denying the motion for mistrial. A29, 37, and authorities there cited. Therefore, there is no basis for jurisdiction under Rule 10.1(a).

The third issue upon which Petitioner seeks review is the admission into evidence of certain exhibits which established that, before beginning operations in Colorado, Louisiana Pacific had been notified by Wisconsin officials that its manufacturing process did not meet the 20% opacity regulation, which also existed in Colorado. Petitioner alleges that the documents had "an obviously prejudicial affect", so that their admission conflicts with a prior holding of this court. Petition at 11. However, the exhibits were properly admitted to establish that Petitioner had prior notice of the nature and level of emissions from a nearly identical process even before it began construction and operation of its Colorado facility, which was relevant to Respondents' negligence and punitive damage claims. Further, there is nothing about the nature of the trial court's specific evidentiary rulings which invoke jurisdiction of this Court under Rule 10.1(c).

Petitioner asserts in conclusory fashion that the trial court failed to comply with Federal Rule of Evidence 403 and *Huddleston v. United States,* 485 U.S. 681 (1988). The Petition contains no argument directly and concisely stating the basis for Petitioner's assertion that the trial court's evidentiary rulings violated *Huddleston.* Petition at 11. As such, the Petition does not comport to the provision of Rule 14.1(j), and Respondents are not able to reply directly.

The trial court carefully and with detail addressed Petitioner's contentions on this topic. Among many other findings, the trial court stated:

> All of the evidence in question was received

> pursuant to Fed. R. Evid. 404(b) on the issue of whether Louisiana Pacific had knowledge or notice concerning what sorts of things are emitted as by-products of the waferboard manufacturing process. Knowledge or notice of these matters was relevant to the question of whether Louisiana Pacific was negligent in designing and operating the Olathe waferboard facility and whether its operation of the facility constituted an unreasonable use of its property. It was also relevant to the question of whether Louisiana Pacific concealed certain facts from the Colorado regulators or misrepresented certain facts to the Colorado regulators. Such misrepresentation or omissions were relevant to the question of whether plaintiffs' punitive damages claim could be premised on an allegation that Louisiana Pacific's conduct at Olathe was attended by circumstances of fraud or willful conduct.

A12-13.

Likewise, the Tenth Circuit thoroughly considered and addressed Petitioner's contention that there was some violation of the holding in *Huddleston.* A9-17. After discussing the criteria set forth in *Huddleston,* A9-10, the Tenth Circuit applied those criteria to the record in this case. After noting that, in the Tenth Circuit, Petitioner was only challenging the first two of the four *Huddleston* criteria and after citing to specific aspects of the testimony at trial, the Tenth Circuit held:

> We hold that the first two *Huddleston* requirements are met here because the evidence was relevant and was offered for a

> proper purpose. The evidence was properly offered to show L-P's prior knowledge and notice of the emissions, both content and quantity, that would result from the operation in Olathe.

A14.

Petitioner's assertion that the trial court and Tenth Circuit violated this Court's holding in *Huddleston* is without merit. To the contrary, both lower courts applied precisely the criteria described in *Huddleston* and determined that these criteria were met in the trial of this case. Therefore there is no basis for jurisdiction under Rule 10.1(c).

The final issue upon which Petitioner seeks review is the contention that the punitive damage awards to the various Respondents are "inconsistent with this Court's attempt to establish clearer guidelines for award of punitive damages pursuant to *Pacific Mutual v. Haslip,* 499 U.S. 1 (1991)." Petition at 12. Other than this assertion as quoted, Petitioner provides no direct or concise argument amplifying the reasons relied on in support of this aspect of its claims. As such, the Petition is in violation of Rule 14.1(j), and Respondents are likewise unable to respond directly.

Respondents note that *Haslip* involved a constitutional due process attack on particular procedures used in the state of Alabama for the consideration and award of punitive damages. *Id.* at 1035. This Court upheld Alabama's state common law scheme for awarding punitive damages, finding adequate constitutional checks and safeguards. *Id.* at 1035. Because punitive damages are a matter of state law, and this case arose in Colorado, and not Alabama, *Haslip* is not pertinent to the instant action. Nevertheless, this Court in *Haslip* upheld the jury's punitive

damage award. *Id.* at 1046. Respondents also note that *Haslip* was not cited or relied on by Petitioner in their briefs before the Tenth Circuit, and the argument that the punitive damage award in this case somehow violates the holding in *Haslip* has been raised for the first time before this Court.

The Tenth Circuit specifically addressed and rejected Petitioner's claim that the punitive damage awards were unreasonable. A48-59. In so doing, among other authorities, the Tenth Circuit looked to this Court's opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993): "[It] is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." A55, *citing TXO*, 113 S. Ct. at 2721-22. After considering that and other authorities, and reviewing and discussing the evidentiary record in this case, the Tenth Circuit held:

> In this record we find significant evidence of circumstances of fraud and a pattern of behavior that indicated that L-P was wanton and reckless in its pursuit of profit over concern for whether it was creating either a public health risk or a nuisance to its neighbors. There is evidence that L-P intentionally violated state pollution standards; manipulated emissions output, monitoring instruments, and light to conceal pollution problems; disregarded the neighbor's complaints; and withheld information from Colorado Health officials. We hold that there is sufficient evidence in the record for a jury to find beyond a reasonable doubt that L-P's conduct was attended by

> circumstances of fraud and wanton and reckless disregard of the injured plaintiffs' rights and feelings.

A53.

The Petitioner cites no authority in support of its suggestion that an award of varying ratios of punitive-to-actual damages among plaintiffs is inconsistent with the rulings of this Court. As the Tenth Circuit held, it was reasonable for the jury to determine the overall punitive damage award based on the sum total of Petitioner's wilful conduct, and then distribute them evenly among plaintiffs since the conduct was not directed at any particular plaintiff. A58-59.

There is nothing about the Tenth Circuit's ruling that conflicts with the *Haslip* case. Petitioner's argument fails to meet the requirements of Rule 10.1(c).

III.

PURSUANT TO RULE 15.1, THE RESPONDENTS IDENTIFY MISSTATEMENTS OF FACT AND LAW CONTAINED IN THE PETITION.

Respondents have identified above certain misstatements of fact contained in the Petition as they relate to Respondents' arguments for denying the Petition. Pursuant to Rule 15.1, Respondents note additional perceived misstatements of fact or law set forth in the Petition which may have a bearing on the question of what issues would properly be before the Court if certiorari were granted.

The Petition Appendix misquotes the decision of the Tenth Circuit by replacing the word "proper" with the word "improper".

A17. Although there are multiple typographical errors in the Petition and Appendix, this particular error arguably distorts an important holding of the Tenth Circuit. As corrected the sentence should read: "Here, because the record demonstrates that the district court's decision to admit was proper under *Huddleston*, any failure to meet the *Kendall* requirements was harmless."

The Petition alleges that Louisiana Pacific's facility in Wisconsin was "unrelated" to the Colorado facility. Petition at 11. However, these facilities were not only related, they produced the same product, with the same manufacturing process, resulting in the same air emissions, and were subject to the same regulatory opacity standard in both states. Both the trial court and Tenth Circuit recognized that Wisconsin and Colorado were evaluating the same air pollution resulting from the same technology. A10-11.

CONCLUSION

The Petition is defective for its failure to comply with the requirements of Rule 14.1. The Petition fails to establish any grounds for this Court to impose its discretionary jurisdiction as set forth in Rule 10.1. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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